

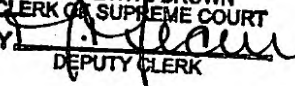
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEVONTAY AYCOCK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84896-COA

FILED

FEB 14 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Devontay Aycock appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on October 12, 2020, and a supplemental petition filed on October 18, 2021. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Aycock argues the district court erred by denying his petition without first conducting an evidentiary hearing. To warrant an evidentiary hearing, a petitioner must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Ineffective assistance of trial counsel

Aycock argues the district court erred by denying his claims that trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice

resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687.

First, Aycock claimed that trial counsel was ineffective for reserving his opening statement. Further, he claimed that counsel was ineffective for making only a short, ineffectual opening statement after the close of the State's case. While counsel's opening statement made after the close of the State's argument was brief, opening statements are not evidence on which the jury may rest its verdict. *See Rodriguez v. State*, 128 Nev. 155, 160 n.3, 273 P.3d 845, 848 n.3 (2012). Further, Aycock failed to offer a proposed different opening statement and did not make any specific claims as to what was defective about the opening statement given. The evidence at trial demonstrates that Aycock admitted to shooting the victim a total of 17 times, and as stated by the supreme court on appeal from Aycock's judgment of conviction, the surveillance video of the altercation shows Aycock continuing to shoot the victim as the victim lay in the street with his hands raised in a defensive posture. *See Aycock v. State*, No. 79684, 2021 WL 2432449, at *1 (Nev. June 11, 2021) (Order of Affirmance). Thus, Aycock cannot demonstrate a reasonable probability of a different outcome at trial had counsel not reserved his opening statement or made a longer opening statement. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Aycock claimed that trial counsel was ineffective for failing to challenge the sufficiency of the charging document because it did not properly allege the injuries for substantial bodily harm. Aycock claimed

the charging document should have set forth which bullet caused the substantial bodily harm and specified what the substantial bodily harm was. Aycock claimed the failure to set forth those specifics allowed the State to change its theory during trial.

The charging document must set forth a plain, concise, and definite written statement of the essential facts constituting the offenses charged. NRS 173.075(1). The purpose of these requirements is to avoid allowing prosecutors to change theories mid-trial, which in effect prejudices the defendant in his or her defense. *Simpson v. Eighth Judicial Dist. Court*, 88 Nev. 654, 660, 503 P.2d 1225, 1230 (1972). “[T]he [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.” *Laney v. State*, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970).

The charging document alleged that Aycock committed battery with the use of a deadly weapon causing substantial bodily harm “by shooting at and into the body of the [victim] resulting in substantial bodily harm.” We conclude this language gave adequate notice to Aycock and sufficiently set forth the essential facts constituting the offense of battery with the use of a deadly weapon causing substantial bodily injury. Thus, Aycock failed to demonstrate counsel was deficient for failing to challenge the charging document. See *Ennis v. State*, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006) (holding that counsel is not deficient for failing to make futile objections). Further, Aycock failed to demonstrate that the wording in the charging document allowed the State to change its theory regarding substantial bodily harm during trial. The State consistently argued that all of the gun shots caused substantial bodily harm. Therefore, we conclude

the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Aycock claimed that trial counsel was ineffective for failing to interview, subpoena, and call a witness. He claimed this witness would have testified that the victim left his garage in an aggressive manner, like he was going to participate in a fight. Aycock claimed this testimony would have supported his self-defense claim. The witness's voluntary statement to the police showed that he watched the fight on his phone. The witness stated that he knew the victim and that the victim exited the garage aggressively like he was going to fight. He saw the victim walk toward Aycock. The witness said the victim looked like "he had nothin'" and he saw the victim approach Aycock. He saw Aycock shoot the victim several times and the victim fell. He saw Aycock walk toward the victim with the gun pointed at the victim. Someone bumped into Aycock, and everyone started running and shooting. Based on this voluntary statement and the evidence presented at trial, Aycock failed to demonstrate prejudice because the testimony of this witness would not have had a reasonable probability of changing the outcome of the trial. *See Culverson v. State*, 106 Nev. 484, 487, 797 P.2d 238, 239 (1990) (providing requirements for justifiable homicide); *see also* NRS 200.200 (providing the requirements for self-defense to apply); NRS 200.275 (applying the self-defense requirements beyond homicide). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fourth, Aycock claimed that trial counsel was ineffective for failing to consult with and call expert witnesses. Aycock failed to allege what experts should have been consulted or what they would have testified to. Thus, Aycock failed to demonstrate counsel was deficient or resulting

prejudice. *Molina v. State*, 120 Nev. 285, 192, 87 P.3d 533, 538 (2004) (providing that a petitioner claiming that counsel did not conduct an adequate investigation must allege what the results of a better investigation would have been and how it would have affected the outcome of the proceedings). Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Fifth, Aycock claimed that trial counsel was ineffective for failing to adequately prepare him to testify. Specifically, Aycock claimed that counsel did not prepare him to discuss the video of the incident because, during trial, Aycock initially refused to participate in that line of questioning. Further, he claimed counsel did not properly prepare him to testify because, on direct examination, he voluntarily stated he had a prior conviction that was not otherwise admissible at trial.

At trial, counsel asked Aycock a few times if he wanted to go through the video while he was testifying. Aycock stated it was not necessary. Later in his testimony, Aycock agreed it would be helpful and he and counsel went through the video. Aycock appeared to know what was on the video, was able to speak about it, and requested counsel to go to certain areas of the video to show different things. Thus, Aycock appeared prepared for his testimony, and Aycock does not allege how further preparation would have had a reasonable probability of changing the outcome at trial.

Trial counsel stated on the record at trial that he had informed Aycock he did not need to disclose that he had been previously convicted of a gross misdemeanor related to guns. While it is possible counsel could have made it clearer to Aycock that he did not need to disclose his prior conviction, Aycock failed to demonstrate he was prejudiced. The gross

misdemeanor was only mentioned twice by Aycock, and the State neither questioned him regarding the prior conviction nor mentioned it during closing arguments. Thus, the reference was brief, and given the evidence presented at trial, Aycock failed to demonstrate a reasonable probability of a different outcome at trial had counsel further informed Aycock that he should not mention his prior conviction. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Sixth, Aycock claimed that trial counsel was ineffective for failing to object to improper cross-examination. Aycock claimed the State improperly used a transcript to impeach and refresh Aycock's memory, which resulted in portions of the transcript simply being read into the record. A witness's recollection may be refreshed by the use of a writing. *See* NRS 50.125. "Before refreshing a witness's memory it must appear that the witness has no recollection of the evidence to be refreshed." *Jeremias v. State*, 134 Nev. 46, 53, 412 P.3d 43, 50 (2018) (internal quotation marks omitted). Further, prior inconsistent statements are admissible to impeach a witness's testimony. *See* NRS 51.035(2)(a)-(b). The State also may generally seek admission of a defendant's statements. *See* NRS 51.035(3).

Counsel objected to the State reading the transcript into the trial, and it was sustained. After the objection, the State proceeded to use the transcript to impeach and refresh Aycock's recollection. Specifically, the State would ask whether Aycock said something to the detectives, Aycock would either deny saying it or claim he said something else, then the State would use the transcript to impeach him or refresh his recollection. This was proper use of the transcript to either impeach Aycock with his prior inconsistent statements or to refresh his recollection. Further, while the

transcript was not admitted at trial, the jury had already viewed the video of the transcribed interview and had the video to review in the jury room. And Aycock did not allege that the transcript materially differed from the video of the interview. Thus, Aycock failed to demonstrate counsel was deficient for failing to further object and failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Seventh, Aycock claimed that trial counsel was ineffective for failing to object to the playing of the 9-1-1 call. He claimed the evidence was more prejudicial than probative and was used to inflame the passions of the jury. To be admissible, evidence must be relevant. NRS 48.025. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015 (internal quotation marks omitted). "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." NRS 48.035(1).

Here, the 9-1-1 call was relevant to the extent of the injuries suffered by the victim. The victim was unavailable to testify at trial, thus the 9-1-1 call was probative as to the extent of the injuries suffered by the victim. In the call, the victim's mother described that her son was bleeding everywhere and that he had been shot in the legs, arms, and body. Aycock failed to demonstrate that the probative value was substantially outweighed by the danger of unfair prejudice. Thus, Aycock failed to demonstrate that counsel was deficient or resulting prejudice. *See Ennis*, 122 Nev. at 706, 137 P.3d at 1103. Therefore, we conclude the district court

did not err by denying this claim without first conducting an evidentiary hearing.

Eighth, Aycock claimed that trial counsel was ineffective for failing to object to bloody photographs taken in the victim's mother's house because they were more prejudicial than probative. "The burden to make a proper appellate record rests on appellant." *Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); *see also* NRAP 30(b)(3). Aycock failed to provide these photographs on appeal. Therefore, we are unable to assess whether the district court erred by finding that the probative value of the photographs is not substantially outweighed by the prejudicial nature of the photographs. Accordingly, Aycock failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel objected. Thus, we conclude Aycock failed to demonstrate the district court erred by denying this claim without first conducting an evidentiary hearing.

Ninth, Aycock claimed that trial counsel was ineffective for failing to file a motion to suppress his statement to the police. He also claimed counsel should have requested an instruction on voluntariness. If *Miranda*¹ rights were administered and validly waived, then a "defendant's statements made during a custodial interrogation may be admitted at trial." *Carroll v. State*, 132 Nev. 269, 282, 371 P.3d 1023, 1032 (2016). "The totality of the circumstances is the primary consideration for determining voluntariness. . . . [T]he question in each case is whether the defendant's will was overborne when he confessed." *Id.* at 279-80, 371 P.3d at 1030 (internal quotation marks, citations, and alterations omitted).

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

Aycock claimed his statement to detectives was not voluntary as demonstrated by the State's questioning of the detective. Aycock claimed the State engaged in extensive questioning of the detective regarding the giving of *Miranda* rights and interrogation methods. Further, Aycock testified that he did not have a lawyer during the interview and that he did not want to talk to police officers until he had a lawyer.

At trial, the detective testified he read the *Miranda* warnings to Aycock and Aycock agreed to speak with the detectives and did not invoke his right to remain silent or to have an attorney present. While the detective testified about deceptive interview techniques, the detective did not testify that those deceptive techniques were used against Aycock and specifically denied lying to Aycock. Aycock admitted at trial that he did not clearly ask for counsel to be present, and he did not communicate to the detectives that he was uncomfortable speaking with them. Based on this record, we conclude Aycock failed to demonstrate his will was overborne or that his statement was involuntary. Because Aycock failed to show his statement was involuntary, he failed to demonstrate counsel was deficient for failing to move to suppress his statement or request a jury instruction on the voluntariness of his statement. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Tenth, Aycock claimed that trial counsel was ineffective for failing to object to hearsay testimony. Specifically, Aycock claimed counsel should have objected to a witness's statement that the victim yelled to get the group of people out from in front of his mother's house. Aycock claimed this statement was hearsay and undermined his testimony that the victim approached him in an aggressive manner. The district court concluded this

statement was hearsay and should have been objected to. However, the district court concluded Aycock did not demonstrate prejudice resulting from the failure because of the overwhelming evidence of guilt presented at trial. Substantial evidence supports the decision of the district court. As stated in the order affirming his judgment of conviction, Aycock was shown on video shooting the victim while the victim was on the ground with his hands in the air, thus showing that Aycock did not shoot the victim in self-defense. *Aycock*, No. 79684, 2021 WL 2432449, at *1. Accordingly, Aycock failed to demonstrate a reasonable probability of a different outcome at trial had counsel objected. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Eleventh, Aycock claimed that trial counsel was ineffective for failing to object to the timeliness of the granting of immunity to the codefendant. He also claimed that trial counsel was ineffective for failing to request a trial continuance in order to interview the codefendant after the grant of immunity. “It is appellant’s responsibility to present relevant authority and cogent argument” *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Aycock acknowledges there is no relevant authority to support his argument that an objection to the timeliness of the granting of immunity would have been successful.² Thus, he failed to demonstrate counsel was deficient for failing to object to the timing of the grant of immunity or a reasonable probability of a different outcome at trial had counsel objected. Further, the only portion of the codefendant’s testimony

²To the extent Aycock appears to allege that counsel should have objected to the witness testifying and not just to the grant of immunity, this claim was raised for the first time in his reply brief, and we decline to consider it. *See LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014).

that Aycock argued was problematic related to the codefendant's destruction of his firearm. However, Aycock failed to demonstrate that interviewing the codefendant would have caused his testimony to be objectionable or allege how different cross-examination would have affected the outcome of trial. Thus, Aycock failed to demonstrate counsel was deficient or a reasonable probability of a different outcome at trial had counsel asked for and received a continuance. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Ineffective assistance of appellate counsel

Next, Aycock claimed that the district court erred by denying his claims that appellate counsel was ineffective. To demonstrate ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that the omitted issue would have a reasonable probability of success on appeal. *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 687. Appellate counsel is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Rather, appellate counsel will be most effective when every conceivable issue is not raised on appeal. *Ford v. State*, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

First, Aycock claimed that appellate counsel was ineffective for failing to argue that the charging document was insufficient and the State was able to change its theory of the case, the 9-1-1 call and the bloody photographs should not have been admitted, Aycock's statement to the police should have been suppressed, and the late grant of immunity by the

State to the codefendant was error. For the reasons discussed in the previous section, the underlying claims lacked merit. Thus, Aycock failed to demonstrate counsel was deficient for failing to raise these claims or that these claims had a reasonable probability of success on appeal. Therefore, we conclude the district court did not err by denying these claims without first conducting an evidentiary hearing.

Second, Aycock claimed that appellate counsel was ineffective for failing to argue that the hearsay testimony by a witness regarding something the victim said should not have been admitted. While the statement was hearsay and probably should not have been admitted, Aycock failed to demonstrate that the error was not harmless given the other testimony and evidence presented at trial. Therefore, he failed to demonstrate this claim had a reasonable probability of success on appeal. *See Richard v. State*, 134 Nev. 518, 526, 424 P.3d 626, 632 (2018) (stating hearsay errors are analyzed for harmless error). Accordingly, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Aycock claimed that appellate counsel failed to fully brief an issue on appeal. He claimed appellate counsel tried to argue that the jury instructions regarding affray and trespass were improper because they improperly referenced uncharged bad acts without the court first conducting a *Petrocelli*³ hearing. Aycock failed to demonstrate that the jury instructions improperly referenced uncharged bad acts and that a *Petrocelli* hearing was necessary. Affray and trespass were *res gestae* of the crimes, *see* NRS 48.035(3), and thus no *Petrocelli* hearing was necessary. *See Bellon*

³*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

v. State, 121 Nev. 436, 444, 117 P.3d 176, 180 (2005). Accordingly, Aycock failed to demonstrate that this claim had a reasonable probability of success on appeal had counsel more artfully argued this claim. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

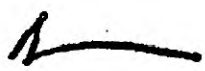
Fourth, Aycock claimed that appellate counsel was ineffective for seeking extensions of time to file the opening brief, filing a short brief that raised only a few issues and cited few authorities, and failing to file a reply brief. Aycock failed to demonstrate he was prejudiced by counsel's performance because, as stated above, none of the claims Aycock argues should have been raised on appeal had a reasonable probability of success. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Cumulative error

Finally, Aycock argues the district court erred by failing to find that the cumulative errors of trial and appellate counsel entitled him to relief. Aycock did not raise this claim below, and we decline to consider it for the first time on appeal. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Hon. Jennifer Schwartz, District Judge
Steven S. Owens
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk